TO DEFEND OR TO SETTLE?
Key Considerations and Legal Strategies Regarding Litigation in the United States

抗辯或和解?
在美國進行訴訟時的主要考慮因素和法律策略

Prepared For:

Taipei, Taiwan
October 21, 2014

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Ⅰ. INTRODUCTION (引言)

A. Litigation in the U.S. is Big Business (訴訟在美國是一個很大的商機)

Litigation in the U.S. is a multi-billion dollar industry. In fact, tort litigation has brought billion-dollar companies to their economic knees.

For example, tort litigation forced the tobacco industry to reach billion-dollar settlements after state attorney generals filed class action lawsuits against tobacco companies for medical costs associated with smoking related diseases. Dow Corning, a multi-billion dollar manufacturer of silicone based products, including breast implants, was forced to file for bankruptcy protection in order to stop the onslaught of lawsuits that paralyzed the company. Other companies, such as pharmaceutical companies, have been forced to voluntarily remove products from the market in the face of mass filings based on junk science.

B. Plaintiffs Have Easy Access to the U.S. Legal System (原告很容易就能接觸美國的法律系統)

The U.S. is a country of many freedoms and rights, including the right to file a lawsuit at a minimum cost. At minimal cost, an individual can drag a corporate giant into court.

Our jury system is available not only for capital criminal cases, but is constitutionally guaranteed for most civil actions. Not to mention that the U.S. has a surplus of lawyers (over 70,000 in Chicago alone). Moreover, we have available a contingency fee method of retaining a lawyer whereby the attorney takes a percentage of any recovery obtained so a plaintiff does not have to incur any expenses upfront to initiate litigation.

C. Attempts to Reform the U.S. Legal System (改革美國法律制度的嘗試)

Despite the exposures present to defendants in U.S. litigation, the world still targets the U.S. as a marketplace for its services and products. In doing so, many companies, including Taiwanese companies, are often subjecting themselves to jurisdiction in U.S. courts and exposing themselves to a legal system that has crippled large companies and entire industries.

Nonetheless, there is hope. Many people in the U.S. have had enough with the excesses that have come from the U.S. civil jury system. Many people in middle class America have come to agree that our legal system has gone too far in favor of plaintiffs' rights. The idea of unlimited damage awards has become disfavored by many, as well as the use of so-called

"experts" that will testify to anything for the right fee.

Others have realized that abuse of the discovery process by lawyers has made the cost of litigation escalate to the point that a defendant is required to expend large sums to defend itself, and, in essence, never really wins its case but rather only manages its losses. What we are beginning to see is some reform of the U.S. legal system, particularly in the area of tort litigation.

D. Tort Litigation Reform (侵權訴訟的改革)

There has been significant tort reform through legislative development over the past 15 years. These tort reform initiatives have been fueled by media attention on what have been reported as frivolous lawsuits.

The quintessential anecdote in the debate over tort reform has been the McDonald's hot coffee case, brought by an elderly woman against McDonald's, after having been burned by hot coffee spilled on her lap. The case attracted a large amount of media attention after the jury in the case rendered a verdict of USD 2.9 million (86,652,000 New Taiwan Dollar) in favor of the plaintiff.

The case, in fact, was used as an example when legislation was introduced in the U.S. Congress in an attempt to implement tort reform measures by the Republican Party. The case also served as material for comedians like Jay Leno, David Letterman, and others who included it in jokes in their television shows.

For proponents of tort reform, the McDonald's case presented a prime example of a frivolous lawsuit. During hearings on Federal Tort Reform Legislation, a congressman expressed the pro-reform view of the case when he said: "I guess that most Americans probably agree that the $3 million judgment recently awarded to a woman who spilled hot coffee in her lap was unreasonable. While the plaintiff in that case, and her lawyer too, may now rest comfortably on that judgment, the rest of America can expect to pay more for lukewarm coffee in the future."

For opponents of tort reform, the McDonald's case represented a legitimate lawsuit where the facts that were not reported by the media demonstrated that the plaintiff suffered 3rd degree burns to over 1/16th of her body, requiring her to be hospitalized for over 3 weeks. Additional evidence established that there were over 700 other accidents involving 2nd and 3rd degree burns from McDonald's coffee. McDonald's own experts testified at trial that coffee

temperatures over 80 degrees was hazardous and not fit for immediate consumption. It is also interesting to note that the plaintiff offered to settle the case early in the process for USD 30,000 (896,400 New Taiwan Dollar), but McDonald's refused.

Ultimately, the punitive damages verdict was reduced by the trial judge for a total revised verdict of USD 640,000 (19,123,200 New Taiwan Dollar). Thereafter, the parties entered into a confidential settlement.

Although no success on tort reform was achieved at the federal level, cases like the McDonald's case nonetheless did result in some level of tort reform at the state level.

Specifically, state level reforms by some states included:

1. Statutory caps on non-economic damages (for example, Wisconsin capped non-economic damages at USD 250,000 (7,470,000 New Taiwan Dollar))
2. Statutes of repose to place outside time limit on when a lawsuit may be filed for defective product or construction defects
3. Caps on punitive damages
   a. 2 states have adopted fixed ceilings
   b. Other states implemented caps based on multiples of compensatory damages (such as 3 times compensatory damages)
   c. Higher burdens of proof required
      i. Clear and convincing evidence as opposed to just a preponderance of the evidence (more like the criminal standard for proof of guilt)

Despite the tort reform that has been implemented by various states, litigation in the U.S. remains a big money industry that can potentially have a significant financial impact on companies subject to litigation in the U.S. civil jury system.

E. Our Law Firm (我們的律師事務所)

For over two decades, Cremer Spina has been defending foreign corporations in U.S. litigation. Many of our clients have now retained us as their National Counsel for all claims. In this role, we have been involved in defending a substantial number of claims – some of these have involved formal lawsuits, and others never resulted in litigation. Our clients retain us as National Counsel because of our specific expertise in defending companies located outside the U.S. against claims brought in the U.S. by U.S. citizens, as well as by foreign nationals.

Our goal in defending claims is to protect companies located outside the U.S. from paying

any money on frivolous claims and to protect our clients from paying unreasonable amounts of money on legitimate claims. If a claim is frivolous, our general approach is to send the claimant or the claimant's attorney a detailed letter outlining the legal and/or factual reasons why the claim has no merit. If a claim is legitimate, the foreign company might still have procedural defenses that can protect it against a lawsuit. In that situation, we will use those defenses to protect the company from paying an unreasonable amount on a claim. The defenses we rely upon in defending companies located outside the U.S. are discussed in more detail below.

Ⅱ. STAGES OF A U.S. CIVIL LAWSUIT (美國民事訴訟的各階段)

A. Introduction (引言)

In this section, we focus on the various phases of a civil lawsuit pending in the U.S. and specifically address the role that a Taiwanese company would play in the litigation process.

Please see the Civil Case Flowcharts, attached as Exhibits A-1 and A-2, which contain a sample of how a case progresses in federal court and in a state court.1 With slight variations, the phases of a civil lawsuit in federal and state court involve primarily the same stages.

B. Initiating a Lawsuit: Filing of the Complaint (發起啟動一個訴訟：提交投訴)

A lawsuit is commenced with the filing of a complaint. The complaint is the document that identifies the person or entity that is seeking relief (the plaintiff), identifies the person or entity from whom the relief is sought (the defendant), and identifies the type of relief sought (monetary, injunctive, or both). The plaintiff may allege only one theory of recovery, such as claiming that the defendant was negligent in failing to do something. Or, the plaintiff may allege multiple theories such, as negligence and breach of warranty. The purpose of the complaint is to put the defendant on notice of the date, location, and nature of the alleged wrongdoing so that the defendant can investigate the claim and prepare the appropriate defenses.

The complaint is filed in the court where the plaintiff elects to proceed with his case. In making this determination, the plaintiff must analyze whether he wishes to proceed in the state or federal system. Once the plaintiff decides which court system he wishes to proceed in, he

1 Source: http://www.ksd.uscourts.gov; http://mllawblog.files.wordpress.com.

then must decide which particular courthouse, or venue, in which to file the case. Generally, venue is proper in the judicial district where the defendant company is located or where the injury or damages occurred.

C. Service of Process (服務的程序)

After the filing of the complaint, it is the plaintiff's responsibility to properly serve the summons and the complaint upon the defendant. The purpose of the service requirement is to put the defendant on notice of the existence and location of the lawsuit. In order for the service to be valid, it must be done in accordance with certain procedural rules. These rules vary from state court to state court. In some states, service can be made by registered mail. In other states, personal service is required, which the county sheriff typically performs. In federal court, the rules allow for a defendant to voluntarily acknowledge the receipt of the lawsuit and consent to the jurisdiction of the court. In return for the judicial and party resources saved by consenting to jurisdiction, the defendant is afforded more time to respond to the complaint. If the defendant refuses to acknowledge the suit and consent to jurisdiction, then personal service of the summons and complaint is necessary.

When an insured company receives delivery of a summons and complaint by mail or by personal service, it is imperative that it immediately notify its insurance broker, insurance company, and legal counsel. It is further imperative that the company provide the above-identified people with copies of all of the documents that have been served on the company by the next business day. There are time limits with respect to certain defenses or strategies that might be raised, and it is imperative that these defenses be examined and preserved before the time to raise them expires.

Many insured companies are a complex group of corporations that include a parent company, holding companies, and subsidiary companies. It will not be unusual to find several of these named in a single lawsuit. These situations raise special issues with respect to the question of whether proper service has been obtained upon the named entities. The general rule is that service of process upon one subsidiary is not appropriate service on the parent company or other sibling companies, unless the other entities have been specifically identified as an agent for service of process. Each company must have procedures in place to follow in the event that a summons and complaint are served upon that entity. All employees in each operating company should be aware of the procedures, and should have key people's contact

information readily available.

D. Initial Response to a Complaint (対投訴的起始回應)

A number of issues need to be examined immediately by legal counsel upon receipt of the service papers. These issues include personal jurisdiction, potential removal of the case to federal court, venue and/or forum non conveniens, any applicable statutes of limitations, and any other immediately available defenses. Many of these potential defenses are especially available to companies located outside of the U.S. These "Special Defenses" are discussed more in detail below. However, every case involves an initial determination of whether removal to federal court is proper and determining whether a lawsuit was timely filed.

Removal of a case to federal court is an important consideration. Federal judges often enjoy better reputations than their state court counterparts, and often are willing to make different rulings such as granting a motion for summary judgment in favor of a defendant and thereby dismissing the suit, or barring an expert witness retained by a plaintiff. For these reasons, plaintiffs often file their case in state court, even though federal court may be an available option. Time is of the essence in filing a petition for removal with the court, because the removal papers must be filed within thirty days of receipt of the complaint. If more than thirty days expires, your company may lose the opportunity to remove the case to federal court. Therefore, timely action is necessary to preserve this important legal strategy and option.

It is also important to determine if the filing of the lawsuit was timely. Every state has enacted rules which regulate the length of time a plaintiff has to file a lawsuit. These limitation periods vary depending on the nature of the claim and whether the plaintiff is a minor at the time the claim occurs. Generally speaking, a plaintiff in most states has two years to file a civil suit for personal injuries – but some states (Florida for example) allow four years. The limitations period can be much longer in commercial disputes involving property damage or breach of contract claims. However, some states have borrowing statutes that will apply the limitations period law for the place where the accident occurred, which could be shorter or longer. It is extremely important at this early stage of the case for legal counsel to gather relevant facts from knowledgeable company representatives to understand the claim and to ensure that all available defenses are explored and raised in the lawsuit.

E. Pretrial Discovery (審前互通資料)

The American civil justice system is different than any other legal system in the world

when it comes to its liberal discovery rules. Generally, U.S. courts will allow litigants to obtain from their opponents any information and documents which are relevant to the dispute or which might lead to the discovery of relevant evidence. The pretrial discovery phase of a lawsuit is divided into three main components: (1) written discovery, including interrogatories and document productions; (2) fact witness depositions; and (3) expert witness disclosures and depositions.

Written discovery is usually completed before any depositions are taken. Some courts place an affirmative duty on the parties to voluntarily produce relevant documents and list potential witnesses without the opposition making a formal request. It is therefore important to have a person identified at each company who will be responsible for coordinating and gathering necessary information to be supplied to legal counsel for review and disclosure in the litigation. Legal counsel should work closely with the companies to help limit the scope of the document production to the extent possible. Further, there are a number of defenses that can be utilized by legal counsel to prevent the production of all requested documents, such as arguing that the request is unduly burdensome, or that it is barred by the attorney-client privilege.

Depositions of fact witnesses generally come next. A deposition is an oral proceeding where the attorney for the opposing side is allowed to ask any party witnesses, such as the company's employees, managers, and so on, questions concerning the issues raised in the lawsuit. A deposition can potentially last several hours and the questions can become quite detailed. Legal counsel should prepare the company's witnesses for deposition and be present to represent them at the deposition. The purpose of the deposition is to allow the attorneys to discover the relevant facts a witness may know and to set up potential cross-examination of the witness at trial.

Taiwan is not a signatory to the Hague Convention on the Taking of Evidence of Abroad, so the terms of the Hague Convention do not apply with respect to the taking of depositions in Taiwan. Instead, in Taiwan, the deposition of a willing witness should comply with certain requirements. For example, private U.S. litigants are responsible for making their own arrangements for stenographers, interpreters, videotape operators, etc. In addition, U.S. litigants should arrange to conduct a deposition of a witness in Taiwan before a Travel Services Officer

of the American Institute in Taiwan (AIT).[2]

In Taiwan, if the witness is willing and local law permits, Federal Rule of Civil Procedure Rule 29 authorizes depositions to take place before any person, at any place, in any manner. Depositions may take place in hotel rooms, business centers, or even by telephone conference. If the witness is not willing, a U.S. litigant may seek to compel a deposition through letters rogatory, a tedious diplomatic process requiring assistance from the courts and consular offices in both nations and taking 6 to 12 months. Moreover, even if successful, the letters rogatory process generally will not result in a traditional U.S.-style deposition, but only in the right for an attorney to obtain testimony in the manner permitted in the foreign country, which may mean submitting written questions in advance.[3]

Expert witness disclosure and discovery is typically the third and final phase of pretrial discovery. Expert witnesses provide testimony on technical matters and other topics beyond the knowledge of the average juror relating to issues raised in the lawsuit. The expert typically prepares a report and/or answers interrogatories that contain his opinions. A deposition of the expert is also taken when allowed by the local discovery rules.

F. Settlement Conference/Mediation/Arbitration (和解會議/調解/仲裁)

Once the discovery phase of the case is complete, and sometime before, there is often an attempt to resolve the case through settlement. Although settlement negotiations can occur at any time, in more complex cases involving expert witnesses and complicated facts, meaningful negotiations generally do not take place until after the parties have had the opportunity to learn the opinions of the adverse experts and to evaluate the potential liability exposure presented by the facts of the case as developed during the discovery process.

The format of settlement discussions can include informal telephone conversations between the attorneys, private mediation services, and formal settlement conferences before the court. In many cases, the named parties are requested to be present at the settlement conference. In more complex cases involving large damage claims, it is common for the parties to appear for a number of settlement sessions before the dispute is finally resolved.

G. Pretrial Motions (預審提案)

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2 Source: The U.S. Department of State, available at travel.state.gov/content/travel/english/legal-considerations/judicial/country/taiwan.html.

3 Source: techlaw.biz/taking-depositions-asia-use-u-s-litigation-part-i.

The plaintiff has the burden of proof in a lawsuit and may have failed to develop sufficient evidence on one or more elements essential to proving his case.

Thus, if there is a basis to do so, a defendant will often file a motion to dismiss. There are several reasons that a defendant may do so: improper service of process, lack of personal jurisdiction, failure to state a cause of action for which relief can be granted, etc. The trial court allows the parties to submit written briefs in support of their positions. The court then holds a hearing on the motion to dismiss. Attorneys represent the parties at this hearing. The lawyers try to persuade the judge why he should rule in favor of their client. If the judge grants the defendant's motion to dismiss, the defendant is no longer in the lawsuit.

Also, it is common for one or both parties to file a motion for summary judgment at any time prior to or during the trial. The purpose of a trial is to resolve disputed facts. The party that files the motion believes that the facts are not disputed and instead require the court to rule in its favor. The trial court allows the parties to submit written briefs supporting their positions. The court will hold a hearing on the motion for summary judgment, and attorneys represent the parties. The plaintiff does not have to prove his case at the summary judgment stage, but he may be required to present some evidence that demonstrates a triable and genuine issue of material fact. In considering a motion for summary judgment, the court must strictly construe all things filed in support of the motion, while liberally construing all things filed in opposition to it. The judge will grant summary judgment where the pleadings, affidavits, depositions, and exhibits on file reveal that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. However, if the judge believes that there is a genuine issue of material fact, he will deny the motion and the case will proceed, even if the judge believes that the moving party will or should prevail at trial.

H. Trial (審理)

The vast majority of civil cases filed in the United States are disposed of prior to the commencement of trial. Pretrial disposal of civil cases usually occurs by either settlement between the parties or granting of a dispositive motion by the court. Published reports estimate that less than 10% of the civil lawsuits filed actually proceed to a trial and verdict. In the event of a trial, however, representatives of the company will play a major role in the trial process.

It will be important to have a representative of the company present at trial to personalize the company and to demonstrate to the judge and jury that the company is interested in the

outcome of the proceedings and is taking the matter seriously. A company representative also helps to "put a face" on the company to remind the jury that corporations are made up of people too.

Other members of the company may serve as technical advisors or expert witnesses to the legal team. In some situations, these witnesses may not have to appear at trial, but instead can give their trial testimony through a videotaped evidence deposition to be played at trial for the benefit of the jury. The decision of whether to present witnesses live or via videotape varies upon the specific circumstances of the case and local court rules.

I. Enforceability of U.S. Judgments In Taiwan (美國判決在台灣的強制執行)

Foreign judgments will be recognized by Taiwan courts if: (1) the foreign court had proper jurisdiction over the subject matter of the suit, as judged by the laws of Taiwan; (2) the judgment is not contrary to the laws or public policy of Taiwan; (3) the judgment is final and non-appealable; (4) the defendant, if a private of corporate citizen of Taiwan, was properly served; and (5) judgments of the courts of Taiwan are enforceable on a reciprocal basis.

J. Appeals Process (上訴程序)

A right of appeal to the intermediate appellate court typically follows an adverse judgment or legal ruling of significance. The appellate court does not conduct another trial, but instead examines the record from the trial court and the briefs submitted by the parties to determine whether the trial judge made any prejudicial errors in the pretrial or trial rulings. It is not uncommon for the appellate process to take over one year before the justices reach a final decision. If there was a money judgment entered in favor of the plaintiff at the trial level, the award will usually earn interest during the pendency of the appeal. In order to secure the payment of the judgment during the appeals process, most courts require the appealing defendant to post a bond or its insurance policy with the court.

We hope this overview helps to provide greater insight into our civil justice system. Furthermore, we hope this demonstrates the important role that a company's employees play in the litigation process and how important it is to ensure that the company has procedures in place for properly dealing with a complaint.

Ⅲ. INTERNATIONAL LEGAL DEFENSES (國際法上的抗辯)

A. Introduction (引言)

There are a number of international legal defenses that may be used when responding to a complaint. These are discussed below. Legal counsel will be in a position to advise whether and which of these legal defenses may be used on behalf of a non-U.S. company in defending against a lawsuit by a U.S. litigant.

B. Service Abroad (海外服務)

The United States is a signatory to the Hague Service Convention, and U.S. courts have interpreted its procedures for serving process as mandatory in most cases. Taiwan is not a signatory to the Hague Convention, so therefore the Convention procedures do not apply.

Instead, "service of process" in Taiwan can be effected by international registered mail/return requested, by agent (usually a local attorney), or pursuant to a letter rogatory. The agent or attorney can execute an affidavit of service before an officer at the American Institute in Taiwan (AIT). In order to enforce a judgment, Taiwan may require that service be effected pursuant to a letter rogatory, rather than by registered mail or by agent.4

In Taiwan, "letters rogatory" are the formal method of service. "Letters Rogatory" are used for obtaining evidence or serving pleadings in countries which are not signers of the Hague Service Convention. They are a request from a court in the U.S. to a court in a foreign country requesting international judicial assistance related to service of process. This method is time-consuming and cumbersome for the U.S. litigant, because use of this method may result in time delays of up to 1 year in the execution of the requests.

Letters rogatory must also comply with several requirements. More specifically, the letters should:

- Contain an offer of reciprocal assistance.
- Include a statement expressing the willingness of the requesting court to reimburse the Taiwan judicial authorities for costs incurred in executing the letter rogatory.
- Be in English with certified translations in Mandarin Chinese.
- Be addressed to the "Appropriate Judicial Authority of Taiwan."
- Be accompanied by a certified check for USD 735.00 payable to the American Institute in Taiwan. This is used to pay any fees charged by the Taiwan court and the fee charged by the American Institute in Taiwan.

4 Source: The U.S. Department of State, available at travel.state.gov/content/travel/english/legal-considerations/judicial/country/taiwan.html.

C. Personal Jurisdiction (個人的法律管轄)

A U.S. court cannot force a Taiwanese defendant to appear and defend itself unless the court has "personal jurisdiction" over the defendant. Personal jurisdiction is a limitation imposed on all U.S. courts by the U.S. Constitution. It requires that before a court may exert control over a foreign defendant, that defendant must be subject to either (1) specific jurisdiction (meaning the claim asserted is directly related to the defendant's contacts with the U.S. forum, i.e. state); or (2) general jurisdiction (meaning the defendant, through its conduct in the subject forum, has submitted itself to jurisdiction on any claim, whether arising directly from its conduct in the subject forum or elsewhere).

Pursuant to the due process clause of the U.S. Constitution, generally, in order for the court to have personal jurisdiction over a foreign company, there must be: (1) proper service of the summons and complaint on the company; (2) minimum "contacts" between the company and the state where the case is pending; and (3) the exercise of jurisdiction over the company must not offend traditional notions of fair play and substantial justice (i.e. is it fair to exercise jurisdiction over the foreign company). Courts will typically look for the following types of "contacts":

- Ownership of property within the state
- Presence of employees within the state
- Advertising in the state
- Shipment of products into the state
- Subsidiary companies working on behalf of the parent in the state
- Execution of contracts in the state
- Websites accessible in the state (particularly where the websites offer products for sale or other interactive features)
- Whether the defendant purposefully availed itself of the benefits and protections of the laws of the state

Specific jurisdiction is proper when the defendant's contacts with the forum are related to the controversy underlying the litigation. Specifically, for a court to exercise specific jurisdiction over a nonresident defendant, not only must the defendant have had purposeful contacts with the forum, but the cause of action must arise from or relate to those contacts. General jurisdiction, on the other hand, allows a forum to exercise jurisdiction over a defendant

even if the cause of action did not arise from or relate to the defendant's contacts with the forum.

Until recently, the exercise of general jurisdiction required simply that a defendant's contacts with the forum be "continuous and systematic." Although such analysis was a more demanding minimum contacts analysis than required for specific jurisdiction, in a very recent case, Daimler AG v. Bauman, the U.S. Supreme Court has heightened that standard to make it significantly more difficult to establish general jurisdiction over a foreign defendant for conduct not related to the forum. In that case, the plaintiffs (Argentinian nationals) attempted to sue Daimler, a German corporation, and to establish general jurisdiction over Daimler in a California court based on the activities of one of Daimler's U.S. subsidiaries in order to hold Daimler accountable for wrongdoing on the part of a separate Daimler subsidiary in Argentina. In short, the U.S. Supreme Court has now established that the "continuous and systematic" contacts analysis must be such that it can be established that the subject forum can be considered the defendant's "home" forum – such as whether the defendant has its principal place of business in the subject forum or is incorporated in the subject forum.

However, special problems can still arise when a foreign company has a subsidiary or related company operating in the U.S. that could be considered to be the "alter-ego" or "instrumentality" of the parent corporation. To make such a showing, the plaintiff will typically have to prove:

- Control by the parent to such a degree that the subsidiary has become its mere instrumentality
- The extent to which the parent finances the subsidiary
- Whether the parent owns all the subsidiaries stock
- Whether the parent caused the incorporation of the subsidiary
- Whether the parent and the subsidiary have common officers and directors
- Whether the subsidiary is undercapitalized

Sole ownership of the subsidiary is insufficient to subject the parent corporation to the jurisdiction of the forum. Instead, there must be clear evidence that the parent in fact controls the activities of the subsidiary.

Additionally, a mere franchisor/franchisee relationship is not generally enough to subject the franchisee to the jurisdiction of the forum where the franchisor or other franchisees are located.

D. Venue/ Forum Non Conveniens (審判地點)

The doctrine of forum non conveniens is also a potentially valuable defense. Pursuant to this doctrine, a U.S. court can find that the court of a different state or even a different country is more convenient for the case to proceed in, and can dismiss the case contingent upon the other court accepting the dispute. A U.S. court would most likely grant this type of motion where the accident or claim forming the subject of the lawsuit arose in a different state.

Pursuant to the doctrine of forum non conveniens, if trial in the plaintiff's chosen forum imposes a heavy burden on the defendant and the court, and where the plaintiff is unable to offer specific reasons of convenience supporting plaintiff's choice, the case may be transferred to a non U.S. venue. There are two main requirements for application of this doctrine:

- An alternative forum must be available in the foreign venue
- An adequate remedy must be available in the foreign venue

Under the law, an "adequate" remedy is not required to be the same remedy as available under U.S. law. If the two main requirements are met, the court will also consider:

- Ease of access to sources of proof and convenience to witnesses
- Availability of compulsory process for witnesses
- Costs of assuring witness attendance at trial
- Enforceability of the judgment
- Opportunity to view the accident site
- Relative congestion of the proposed forums
- Choice of law

A plaintiff arguing against forum non conveniens often points to the availability of video deposition, video conferencing, and other technologies that could be used to make trial in the U.S. more convenient.

E. Choice of Law (法律的選擇)

Just because a lawsuit is filed in the U.S., it does not mean that a U.S. state's law will apply to the case. "Choice of law" refers to whether Taiwanese law or U.S. law will govern the lawsuit. Different courts apply different tests in its "choice of law" analysis, but most courts will apply the law of the place where injury occurred, unless another state or country has more significant interest in the outcome of the case. In addition to the place of the injury, courts will also consider:

- Place of conduct causing the injury
- Residence of parties
- Place where relationship between the parties was centered

The local laws where the foreign insured companies are located are generally more beneficial to our defenses than U.S. law, and generally provide for lower damages awards, so we often raise this issue in defense of the insured companies.

Ⅳ. WHEN TO DEFEND V. WHEN TO SETTLE (何時當抗辯，何時當和解)

Between defending a case and settling a case, the reality is that most civil cases settle. Prior to the commencement of the trial process, the vast majority of personal injury and product liability lawsuits in the U.S. are settled out of court. Approximately 80-90% of pending lawsuits end in a settlement.

Settling can have certain benefits, and most judges push the parties toward settlement negotiations in an attempt to settle the case instead of going to trial. With an out-of-court settlement, both parties have negotiated control over how much a defendant must pay out. In addition, settlement offers the advantage of predictability in that the parties can fashion their own compromise.

Another reason most cases settle is because of the uncertainty of how juries will rule. Trials are notoriously unpredictable. What a plaintiff receives is up to the jury's discretion, and predicting what that number will be ahead of time can never be more than an educated guess.

An added benefit of settlement for a defendant is privacy. Details of the case can be kept private when settled. When you take a case to trial, the court documents become a public record, which means that anyone could have access to them. When you settle a case, by contrast, most of the details are kept out of the court documents, and are not a public record. Many settlement agreements also have confidentiality agreements as part of the settlement, such that the details of the case and the terms of the settlement cannot be disclosed to the public.

In addition, it generally is better from a financial standpoint to settle a case than go to trial, for both plaintiffs and defendants. A comprehensive study of civil lawsuits found that most of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less

money than if they had taken that offer.5 The findings are based on a study of 2,054 cases that went to trial from 2002 to 2005. The study found that:

- Plaintiffs were wrong most of the time – in 61% of cases.
- Defendants made the wrong decision by proceeding to trial far less often, in 24% of cases.
- In just 15% of cases, both sides were right to go to trial — meaning that the defendant paid less than the plaintiff had wanted but the plaintiff got more than the defendant had offered.

The lesson for plaintiffs from this study is, in the vast majority of cases, plaintiffs do worse at trial, and defendants do better at trial. This is another reason why plaintiffs' attorneys often try to settle a case instead of taking it all the way to trial.

Overall, there are many important factors to consider when deciding when it would be best to settle a case. Generally speaking, some of the factors to consider when analyzing whether settlement is appropriate include, but are not limited to, the following:

- Proof of fault
- Verdict potential
- Whether the plaintiff has jury appeal
- Whether other parties to the suit have comparative fault or liability
- Amount in controversy
- Expenses of ongoing litigation
- Potential bad press to the company and other business considerations
- Who is the judge assigned to the case
- Identity and track record of counsel
- Where the case is venued

In the end, these factors will differ and depend on the facts of each case. The defense attorneys hired to represent the insured will help to provide a careful assessment of whether and when it is worthwhile to try to settle a case.

V. THIRD-PARTY COMPLAINTS: WHEN TO BATTLE V. WHEN TO COOPERATE (第三方訴訟：何時當對抗 vs. 何時當合作)

5 Source: Jonathan Glater, "Study Finds Settling Is Better Than Going to Trial," New York Times, Aug. 8, 2008. The study may be found at Journal of Empirical Legal Studies, Volume 5, Issue 3, 551 – 591, Sept. 2008.

A. Introduction (引言)

Most lawsuits are not a straight-forward suit between one plaintiff and one defendant. Often, there are multiple plaintiffs, multiple defendants, and multiple claims. As the number of parties in a lawsuit grows, there are additional considerations and strategies to bear in mind. In addition, there are certain instances where third-party complaints, such as cross-claims and counterclaims by and between the various parties in the litigation, may be appropriate.

B. Whom To Sue (起訴誰)

From the plaintiff's point of view, one of the preliminary considerations is deciding whom to sue. A plaintiff can file suit by taking a shotgun approach where they sue all potential defendants. Alternatively, a plaintiff can take a more tailored approach and sue only a few target defendants, such that the defendants then bring in more parties.

One issue may be whether there is even a right to sue a particular defendant. For example, in most states, you cannot bring in an employer as a defendant. Workers' compensation statutes in most states limit a worker's remedies for work-related personal or products liability injuries to a workers' compensation claim against the employer. Except in narrow circumstances, such as where the employer actually intends to cause harm to the worker, no matter how egregious the employer's conduct is, the worker's sole remedy against the employer is through the workers' compensation system.

From the defendant's point of view, a key strategy consideration to keep in mind is that, when there is infighting between third-party plaintiffs and third-party defendants, this ends up benefiting the plaintiff. This is called "finger pointing," and it describes a situation where the third parties blame each other for being liable for the plaintiff's claims and damages. This sort of infighting can cause additional motion practice, additional disputes during the discovery process, and can complicate settlement negotiations. By having third parties blame each other, the third parties end up doing the work for the plaintiff—e.g., proving the plaintiff's case for him. Therefore, as a defendant, you may not want to join a third-party defendant, because doing so may help the plaintiff's case.

In some states, juries are instructed to take into consideration the fault of non-parties, so third-party practice may not be necessary. For instance, in Texas, a defendant can designate a non-party as a responsible third-party, and, if there is evidence related to that third-party's fault, can include that third-party in the jury charge. See Tex. Civ. Prac. & Rem. Code 33.001-33.004.

C. Third-Party Practice (第三方實踐)

It may be important to undergo investigation and discovery in order to figure out whether the plaintiff or other defendants have any role in the fault underlying a claim. This can determine whether it would be appropriate to engage in third-party practice.

For instance, if the plaintiff is believed to have contributory fault, then a counterclaim against the plaintiff may be appropriate. Each state has different laws concerning this. For example, under Illinois law, if a given plaintiff's percentage of fault is found to be 50% or less of the total fault, that plaintiff can still recover damages, but those damages will be reduced by the percentage of the total fault assigned to that plaintiff. If a given plaintiff is found to be more than 50% at fault, that plaintiff is barred from recovery.

If the case involves other co-defendants and there is a basis to believe that the other defendants were responsible for some of the fault, then a counterclaim against those defendants may be appropriate. Using Illinois law as an example, to the extent that the evidence establishes fault on the part of any of the other defendants, the liability to the insured company will be reduced under Illinois' modified comparative fault regime.

Basically, if the attorneys retained to represent the insured uncover evidence of fault of a co-defendant or third party, the attorneys may recommend filing a claim for contribution. Contribution contemplates situations where several tortfeasors (or wrongdoers) have contributed to the plaintiff's loss or injury in some way and allows a tortfeasor to recover contribution when it has paid more than its proportionate share of the common liability. Or, the attorneys retained to represent the insured may uncover evidence that will allow it to be indemnified by another party, which is to say to shift the entire loss to another tortfeasor, whether by express or implied contract.

Ultimately, the decision to assert any third-party complaints will depend on the facts of each case. The defense attorneys hired to represent the insured will help to provide a careful assessment of whether and when it is worthwhile to file a third-party complaint against another party.

Ⅵ. ENGAGING NATIONAL COUNSEL (委任協調律師)

Although the idea of using national counsel has been around for years--companies such as Caterpillar Inc. and Teva Pharmaceutical Industries Ltd. have been doing it since the

1980s--more and more companies today are retaining national counsel to handle their litigation. In 2003, U-Haul International Inc. implemented a national counsel system in its legal department. In 2005, Qwest Communications Inc. began using national counsel to handle its litigation. Even the Bush-Cheney campaign employed national counsel to help manage its litigation.6

There are many benefits to retaining counsel, such that this increasing popularity of national counsel is not surprising. In an America that has become more and more litigious and a globalized economy that forces corporations to continuously tighten budgets, legal departments are constantly challenged to do more with less. Ongoing litigation is often the biggest drain on the legal department's budget. Therefore, to the insurer, defense counsel are critical to controlling insurance costs by defeating or limiting insureds' liability in covered claims.

By retaining one outside counsel or group from one law firm to work on the overall litigation for a corporation, there are many efficiencies to be gained by limiting the number of outside counsel. The corporation can gain efficiencies by working with a law firm that understands the corporation, understands the product line, understands the company philosophy with respect to product defense, and understands the substantive and procedural law of the place where the suit is filed. In addition, the corporation develops a partnership with its national counsel, a relationship built on trust. By working with the same national counsel, the corporation can shorten the entire litigation process, as well as address key issues to resolve claims and cases as effectively expeditiously as possible.

Ⅶ. A TRIPARTITE RELATIONSHIP: THE INSURER, THE INSURED, AND THE ATTORNEY (保險人，被保險人與律師的三方關係)

The cooperation between (1) the insurer (including the insurance adjuster), (2) the insured, and (3) the defense attorney are important to keep in mind for the optimal litigation defense and resolution of a case. Once an insurer accepts its defense obligations and begins to undertake its "duty to defend" the insured, this situation creates a "tripartite" relationship between the insurer, the insured, and the attorney. At this point, the attorney has professional responsibility obligations to both the insured and the insurer. In other words, why cooperation between the

6 Source: Inside Counsel Magazine, available at http://www.insidecounsel.com/2005/02/01/national-counsel-gain-popularity-with-gcs.

three parties is so important is the idea is that the three parties are on the same team for a common purpose — a good outcome of the claim and of the lawsuit.

The insurer generally has a contractual right to "control" the defense. Most liability insurance markets have settled on contract terms that provide for the insurer to manage the defense, and gives it the “right and duty to defend.” Insurers generally have more expertise than most insureds in managing litigation. They have stronger, more immediate incentives to efficiently manage litigation.

Generally speaking, the insurer has the right to settle cases within policy limits. Most insurance policies give the insurer the right to control settlement of the case, once the insurer agrees to fund the insured's defense. And although the insurer has the right to settle cases within the liability insurance policy limits, in general, the insurer's conduct must be reasonable. In practice, the attorney is often tasked with the job of advising both the insured and the insurer on the recommendations and the reasonableness concerning a settlement offer.

The insured is the attorney’s primary client. The attorney should look to the insured, rather than the insurer, when making important decisions related to defense strategy over the course of the litigation. What this means is that the attorney must be prepared to protect the client's best interests and zealously advocate on behalf of the insured.

The attorney will work with the insured to learn the facts necessary to defend the case, as well as to obtain relevant, responsive information and documents that are in the insured’s possession, custody, and/or control. The attorney will then often provide detailed status updates to the insurance adjuster or company representative of the insurer. This can include periodic case development memoranda, narrative summaries of depositions, and case-specific strategic recommendations. Depending on what the attorney discovers during fact investigation, legal analysis, and discovery, the attorney may recommend that the insurance adjuster increase the reserves set aside for the particular claim, that the case should settle instead of going to trial, or may request approval to undertake certain dispositive motions in the case. In this manner, the attorney will work closely with the insured, the insurer, and the insurance adjuster throughout the course of the litigation.

Ⅷ. LAW IN ACTION: CASE STUDY (案例研究)

A. Introduction (引言)

The following is a case study that highlights many of the topics we have discussed above.[7] The case is called ABC Corp. v. Doe, a 2007 Texas case that went up to the Fifth District Court of Appeals of Texas. Our firm represented ABC Corporation, a Taiwanese manufacturer of the electronic test equipment that was at issue in the suit. The plaintiff was an electrician who brought a lawsuit against ABC Corporation,, seeking damages incurred from injuries he received when he was electrocuted following a voltage tester misreading. Our firm was successful in having the suit against ABC Corporation dismissed based on lack of personal jurisdiction.[8]

B. Facts of the Case (案件事實)

On December 7, 2004, John Doe ("Plaintiff"), a lineman electrician, used a CM-600 clamp meter while checking for voltage on a power line in Dallas, Texas. Because the clamp meter read "zero voltage," Plaintiff worked on and in close proximity to an electrical transformer. When his chest and torso came into contact with the transformer, however, Plaintiff was electrocuted. Plaintiff suffered severe electrical shock and burn injuries, resulting in the amputation of both of his arms, impaired vision, scarring, hyper-sensitivity to the skin, and limitations on the use of his entire body. Plaintiff was 35-years old at the time of the incident.

In its Third Amended Original Petition, filed in the Dallas County District Court (298th Judicial District), Plaintiff sued three defendants for damages resulting from the injuries he suffered: (1) EDC, who was alleged to have owned, controlled, and operated the electrical distribution feeder line that Plaintiff was working on when he was electrocuted; (2) GTI, who was alleged to have distributed the CM-600 clamp meter; and (3) our client, ABC Corporation, who was alleged to have designed, manufactured, and sold the CM-600 clamp meter.

The complaint contained allegations of design defect and marketing defect against GTI and ABC Corporation. The complaint further alleged breach of implied warranty against GTI and ABC Corporation, and alleged negligence against EDC. Plaintiff sought damages for past and future medical and living expenses, past and future lost earning capacity, past and future physical impairment, past and future pain and suffering, past and future mental anguish ,and past and future disfigurement. Co-defendant, GTI also filed cross-claims against ABC

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7 In compliance with the Commercial Confidentiality Act, all party names have been changed to a fictitious name for purposes of this case study.

8 ABC Corp. v. Doe, --- S.W.3d --- (Tex. App.—Dallas 2007, pet. denied).

Corporation for contribution and/or indemnity.

C. Our Legal Analysis & Defense Strategy (我們的法律分析及防禦策略)

We filed a special appearance and a motion to dismiss ABC Corporation as a defendant from the suit based on the Texas court's lack of personal jurisdiction over ABC Corporation.

After a detailed review of all of the facts of the case, as well as a review of the corporate structure of ABC Corporation, we determined that we had a strong legal defense and a basis for asserting that both general and specific jurisdiction were lacking in this case. In support of its special appearance, ABC Corporation filed the affidavit of its president, John Smith. Please see Affidavit of John Smith, attached as Exhibit B-1.

In his affidavit, Smith testified to the following key facts to establish the lack of general jurisdiction over ABC Corporation:

- ABC Corporation is organized and existing under the laws of Taiwan.
- ABC Corporation operates out of its principal place of business in Taipei, Taiwan.
- ABC Corporation is not incorporated in Texas.
- ABC Corporation is not registered, licensed, or otherwise authorized to do business in Texas.
- ABC Corporation does not have a registered agent in Texas.
- ABC Corporation does not own, rent, or lease property in Texas.
- ABC Corporation does not maintain an office in Texas and has never done so.
- ABC Corporation does not maintain employees in Texas.
- ABC Corporation does not have a phone number or a phone directory listing in Texas.
- ABC Corporation does not maintain a bank account in Texas and has never done so.
- No employee, representative, or agent of ABC Corporation has traveled to Texas on behalf of ABC Corporation in any lawsuit.
- ABC Corporation maintains no assets in Texas.

In addition, Smith testified to the following key facts to establish the lack of specific jurisdiction over ABC Corporation:

- To the extent Plaintiff was able to prove ABC Corporation did design and/or manufacture the CM-600 series clamp meter at issue in this lawsuit, ABC Corporation would not have sold that clamp meter or other such electronic test and measurement instruments, to any citizen of Texas.

- Any clamp meters designed and/or manufactured by ABC Corporation bearing the GTI name were purchased from ABC Corporation directly by GTI.
- ABC Corporation products purchased by GTI were shipped to GTI in Illinois, shipment terms free-on-board (FOB), meaning that title passed to GTI in Taiwan.
- ABC Corporation had no specific knowledge that GTI was selling products manufactured by ABC Corporation to individuals and/or businesses located in Texas.
- ABC Corporation did not participate in or control any decision by GTI to ship ABC Corporation products to any ultimate destination in Texas.

Co-defendant, GTI filed an opposition brief in response to ABC Corporation's special appearance, asserting that ABC Corporation's contacts were sufficient to confer specific jurisdiction. In support of its response, GTI attached the affidavits of two GTI employees—Thomas Football, a senior sourcing buyer, and Sally Johnson, a senior electrical engineer. Essentially, GTI argued that it made ABC Corporation aware of its national distribution network and informed ABC Corporation that the clamp meters would be sold to large national retailers, such that ABC Corporation "must have known" some of the eventual sales of its product would end up in the State of Texas.

D. The Court of Appeals Ruling (上訴法院的裁決)

On appeal, we were successful in having the suit against ABC Corporation dismissed based on lack of personal jurisdiction. The trial court denied our motion to dismiss ABC Corporation as a defendant from the suit, and accordingly, we took the matter up on appeal.

The Fifth District Court of Appeals ruled in our favor. The Court of Appeals found that the evidence showed that ABC Corporation did not conduct activity in or directed at Texas. The Court reasoned that, although ABC Corporation sold GTI the CM-600 series clamp meters, title to the clamp meters passed from ABC Corporation to GTI in Taiwan, and there was no evidence ABC Corporation participated in or controlled the decision to ship ABC Corporation products to a particular region or state. Rather, it was GTI, the distributor, that sold the clamp meters throughout the United States.

The Court rejected GTI's argument that ABC Corporation "must have known" some of the eventual sales of its product would be in Texas does not meet the "purposeful availment" or "substantial connection" standard required to establish specific jurisdiction. In this case, there was no act or action by ABC Corporation to establish "availment." There was no evidence

that ABC Corporation knew the distribution network included Texas or that the retailers were located in Texas. And, there was no evidence ABC Corporation knew GTI had distributors and customers in Texas.

Moreover, ABC Corporation did not advertise its product in Texas, nor did it provide advice to Texas buyers or have any sales agents in Texas. ABC Corporation did not "create, control, or employ" the distribution network that brought the clamp meter to Texas. There was no evidence that ABC Corporation "took any act purposefully directed toward selling or distributing" CM-600 series clamp meters in Texas. The Court emphasized that a "defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."

The Court of Appeals ruled in our favor, and vacated the trial court's order. Accordingly, on August 13, 2008, the Dallas County Circuit Court entered an order dismissing ABC Corporation from the case on the basis of lack of personal jurisdiction. Plaintiff's claims and GTI's cross-claims against ABC Corporation were dismissed. Please see the Order of Dismissal, attached as Exhibit B-2.

What cases like this demonstrate is that careful, thorough investigation into the facts of a claim and into the business structure and activities of the insured company can be pivotal in successfully defending a claim. By showing the Texas Court of Appeals that a Texas court lacked the requisite personal jurisdiction to haul ABC Corporation into Texas, we were able to defend the claim and defeat a costly lawsuit.

Ⅸ. CONCLUDING REMARKS (結語)

As the world continues to transform into a more globalized and interdependent economy, foreign companies are more likely to be named in U.S. litigation. However, foreign nationals have a plethora of procedural defenses available to them if they are sued in the U.S. Many of these defenses are time-sensitive and can be waived if not properly raised at the correct time. Also, understanding how U.S. litigation works can help a foreign company take precautions to protect itself from becoming involved in U.S. litigation, and also to protect itself once it becomes involved in U.S. litigation.